

**THE NOVA SCOTIA FREEDOM OF INFORMATION  
AND PROTECTION OF PRIVACY ACT**

**A REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF ENVIRONMENT AND LABOUR** to disclose most of an Environmental Site Assessment Report on a Halifax property.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE:** August 18, 2003

**ISSUE:** Whether **Section 21(1)** supports a third party's position opposing a decision to provide an applicant with a copy of an Environmental Site Assessment report commissioned by the third party.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, dated May 1, 2003, received May 13, 2003, a third party asked that I recommend the Department of Environment and Labour (the Department) reverse its decision to provide to an applicant a severed copy of a document containing information about the environmental conditions of a property in Halifax.

In deciding to disclose the severed document, the Department was responding to an application for "all information regarding the environmental conditions for the property... including all environmental registry and tank information and any information on remediation of hydrocarbons at the property." The severed portions of the document contained the financial information of the third party. They are not in dispute.

In accordance with **Section 22** of the **Act** the Department informed the third party of the application and offered it an opportunity to consent or object to the disclosure of the information. Despite objections from the third party the Department decided to disclose the report. The third party was advised it could ask for a review of that decision and it did. Until a third party exhausts all avenues of appeal of a decision (a third party can appeal to the Nova Scotia Supreme Court) a Department cannot provide the related records to the applicant.

*Background:*

There is a legal dispute with respect to possible petroleum contamination of the property in question. The Environmental Site Assessment Report (ESA) was prepared by consultants retained by the owner of the property. A copy of the ESA report and a lease agreement were provided to the Department.

During this Office's mediation process, the application was reduced to the "Phase II Environmental Site Assessment Report."

*The third party's submission:*

The third party cited the mandatory exemption under Section 21(1) which protects the interests of third parties who may be affected by the decision of a public body. Specifically it cited s.21(1)(a)(ii), s. 21(1)(b) and s. 21(1)(c)(i)and (ii).

**Confidential information**

21(1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(ii) commercial, financial, labour relations, scientific or technical information of a third party

(b) that is supplied, implicitly or explicitly in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied.

The third party recognized it must offer proof that all the three sub-sections [(a), (b) and (c)] apply.

In putting forward its arguments, the third party drew attention to my recent Review, FI-03-26, which dealt with a similar issue. (See Review Office website [www.foipop.ns.ca](http://www.foipop.ns.ca)) It said I should reach the same conclusions with respect to s.21(1)(a)(ii) and s.21(1)(b) as I did in that Review. But it said that unlike my decision with respect to s.21(1)(c)) in my earlier Review, where I rejected the arguments of the third party, I should accept the arguments in this submission.

In this case, the third party argued, the ESA Report was prepared by consultants hired by the owner of the property as part of an on-going legal proceeding, relating to a possible contamination on the property. It cited another of my Reviews, FI-01-72, as well as a Nova

Scotia Court of Appeal decision *Davies v. Harrington* (1980), 39 N.S.R. (2d), affirming that “a document enjoys litigation privilege when the dominant purpose for which it was prepared was that of submitting it to a legal advisor for advice and use in litigation privilege.”

The third party continued that the site assessment was not required or requested by the Department and was submitted with an expectation of privacy and litigation privilege. “We submit that the ESA in this case should be withheld under both s.21(1)(c)(i) and (ii), as disclosure of this report at this stage in the on-going litigation could interfere significantly with the position of (the owner) in the present litigation.” The third party also stated, that disclosure would create a chilling effect on other third parties also involved with litigation in supplying such information to the Department voluntarily.

The third party said it is difficult to prove harm in this case because it does not know the intentions of the applicant.

*The Applicant's submission:*

The Applicant did not address the exemption under s.21(1). It accepted that privileged and personal information, as well as remediation/assessment costs, should be withheld. However, he said, documented site information such as site gradients and contaminants levels should be disclosed to provide him with insight into potential future concerns of adjacent lands.

*The Department's submission:*

On the matter of the lawsuit, the Department noted the **Act** does not address private litigation situations to which the government is not a party. It said it cannot base a decision on disclosure on civil lawsuits to which the government has no knowledge or details. Having asked itself if disclosing the Environmental Site Assessment Report would provide one party with an advantage or disadvantage over the other, the Department concluded that it would not.

“Given that both parties in the civil lawsuit would be privy to full disclosure through judicial process, this was not seen to be a factor in the disclosure decision.”

The Department said that when the third party provided it with the ESA report there was no indication that the report was prepared for the dominant purpose of litigation.

The Department concluded that the “applicant’s right of access to the information (other than financial or personal) in this case outweighed the 3<sup>rd</sup> party’s concerns regarding disclosure.”

**Conclusions:**

**Section 45(3)(b)** places the burden of proof on the third party to prove that s.21(1) applies to the ESA report and that, therefore, the applicant has no right of access to the report.

*Scientific or technical information - s. 21(1)(a)(ii):*

I agree with the third party that the first part of the three-way test is met because the report clearly contains technical information belonging to the third party which commissioned the report.

*Supplied in confidence - s. 21(1)(b):*

The Department admits that the report was supplied to the Department in confidence. However, the Department's published *Policy on Access to Voluntary Environmental Audits and Environment Site Assessments* (1999) makes it clear that

“Requests for confidentiality, including withholding an audit or assessment for release to a third party, will be recognized by the Department. These records are still, however, subject to the Freedom of Information and Protection of Privacy Act and the release of this material may be compelled by provisions of this legislation.”

*Proof of harm - s.21(1)(c)(i):*

The third party made no substantial argument with respect to harm which might be caused by the disclosure of the report except for the possible impact on the outcome of a lawsuit. This isn't enough to lead me to conclude that the disclosure of the report would “significantly” harm the negotiating interests of the third party. The ESA report at issue here is typical of other such reports disclosed by the Department on request. It contains nothing out of the ordinary.

*Harm to the public interest - s.21(1)(c)(ii):*

The Department was not convinced by the argument that such environmental site assessments would no longer be provided to the Department if complete confidentiality cannot be assured. In accordance with the *Environment Act* the Department can require that such reports be provided. Given the requirements of that Act and the powers it gives the Minister, it is reasonable to conclude that the Department will continue to have access to ESA Reports.

**Recommendation:**

That the Department proceed with its original decision to disclose the Phase II Environmental Site Assessment Report to the applicant.

**Section 40** of the Act requires the Department to make a decision on this recommendation within 30 days of receiving this Review and to notify the Applicant and the Review Officer, in writing, of the decision.

**Dated** at Halifax, Nova Scotia this 18 day of August, 2003.

Darce Fardy, Review Officer